

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ALBERT KWAN,)	
)	
)	No. C03-2888L
Plaintiff,)	
v.)	ORDER DISMISSING ACTION FOR
)	LACK OF SUBJECT MATTER
UNITED STATES CUSTOMS SERVICE,)	JURISDICTION
)	
)	
Defendant.)	

This case comes before the Court on defendant’s “Motion to Dismiss Pursuant to Rule 12(b)(2) and Rule 12(b)(6)” (“Motion to Dismiss”). Plaintiff brought suit against the United States Customs Service (“Customs”)¹ for 1) a declaratory judgment stating that Customs is not authorized to seize vehicles strictly on the basis that the vehicle has a hidden compartment; 2) an order requiring Customs to stop using “hold harmless” agreements; 3) an order requiring Customs to properly train its employees; and 4) money damages and attorney’s fees. See Complaint for Money Damages at 3-4 (“Complaint”). Defendant moves for dismissal under

¹ The United States Customs service is now known as United States Customs and Border Protection, pursuant to the creation of the Department of Homeland Security in 2003.

1 Fed. R. Civ. P. 12(b)(2) (lack of personal jurisdiction) or alternatively, under Fed. R. Civ. P.
 2 12(b)(6) (failure to state a claim). Though defendant does not reference Fed. R. Civ. P. 12(b)(1)
 3 (lack of subject matter jurisdiction) in the caption, defendant argues lack of subject matter
 4 jurisdiction as well.² See Motion to Dismiss at 6-7; Reply at 3.

5 **A. The United States Is the Proper Defendant.**

6 Plaintiff has brought his claim against Customs, not the United States. See Complaint.
 7 Suits against federal agencies may be barred by sovereign immunity if the conduct alleged was
 8 undertaken on behalf of the government. See South Delta Water Agency v. Dept. of Interior,
 9 767 F.2d 531, 536 (9th Cir. 1985). A plaintiff cannot avoid sovereign immunity by simply
 10 designating an agency as the defendant. See Hutchinson v. United States, 677 F.2d 1322, 1327
 11 (9th Cir. 1982); see also Nat'l Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1246 (10th
 12 Cir. 1989) (noting sovereign immunity cannot be avoided by naming agencies or employees of
 13 the federal government as defendants when the proper party is the United States itself). "In
 14 sovereign immunity analysis, any lawsuit against an agency of the United States or against an
 15 officer of the United States in his or her official capacity is considered an action against the
 16 United States." Basler v. Dept. of Justice, 327 F.3d 903, 907 (9th Cir. 2003).

17 For the purposes of sovereign immunity, an action is against the United States if the relief
 18 sought would: 1) expend itself on the public treasury; 2) interfere with public administration; or
 19 3) restrain the government from acting or compel the government to act. Dugan v. Rank, 372

20
 21 ² Subject matter jurisdiction can be raised at any point in the proceedings. Fed. R. Civ. P.
 22 12(h)(3). Therefore, to the extent this Motion to Dismiss relates to subject matter jurisdiction, plaintiff's
 23 contention that defendant's Motion to Dismiss was untimely is moot. See Response at 10. Moreover,
 24 sovereign immunity may be asserted at any stage of the proceedings, either by parties *or by the court*.
Cal. Dept. of Fish & Game v. Quechan Tribe of Indians, 595 F.2d 1153, 1155 n.1 (9th Cir. 1979)
 (emphasis added).

1 U.S. 609, 620 (1963). Plaintiff seeks money damages and an order that compels or restrains
 2 government action in regards to seizures and the subsequent release of seized property. See
 3 Complaint at 3. Therefore the relief requested clearly implicates the United States and the
 4 United States is the proper defendant in this action.³

5 **B. Sovereign Immunity Bars Plaintiff's Claims.**

6 The United States, as sovereign, is immune from suit unless it has waived its immunity.
 7 United States v. Mitchell, 445 U.S. 535, 538 (1980). Waiver of sovereign immunity "cannot be
 8 implied but must be unequivocally expressed." Id. Only Congress can waive sovereign
 9 immunity. See Midwest Growers Coop. Corp. v. Kirkemo, 533 F.2d 455, 465 (9th Cir. 1976).
 10 The burden of directing the Court to an explicit waiver of immunity is on the party bringing the
 11 suit. Holloman v. Watt, 708 F.2d 1399, 1401 (9th Cir. 1983), cert. denied, 466 U.S. 958 (1984).

12 The Federal Tort Claims Act ("FTCA") waives immunity and grants district courts

13 exclusive jurisdiction of civil actions on claims against the United States,
 14 for money damages . . . for injury of property, or personal injury or death
 15 caused by the negligent or wrongful act or omission of any employee of the
 16 Government while acting within the scope of his office or employment,
 under circumstances where the United States, if a private person, would be
 liable to the claimant in accordance with the law of the place where the act
 or omission occurred.

17 28 U.S.C. § 1346(b). The FTCA is the exclusive remedy against the United States for claims
 18 sounding in tort. See id. at § 1346(a). The question of whether the United States has waived its
 19 sovereign immunity against suits for damages is a question of subject matter jurisdiction.

20 McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988).

21 The FTCA contains a limited number of exceptions pursuant to which the government is
 22 immune from suit, notwithstanding that a private party could be liable under the same

24 ³ Moreover, plaintiff concedes "[t]he acts alleged herein by employees of the United States
 25 Customs Service were committed on behalf of the United States of America" Complaint at 1.

1 circumstances. See 28 U.S.C. § 2680(a)-(n). While the plaintiff bears the burden of directing
 2 the Court to a waiver of immunity, the United States bears the burden of proving one of the
 3 exceptions applies. Prescott v. United States, 973 F.2d 696, 701 (9th Cir. 1992). One of the
 4 exceptions found in § 2680 relieves the United States of liability for “any claim arising in
 5 respect of . . . the detention of any goods, merchandise, or other property by any officer of
 6 customs or excise or any other law enforcement officer.” § 2680(c) (“Detention Exception”).
 7 However, the FTCA allows claims based on injury or loss of goods, merchandise, or other
 8 property, while in the possession of government officers if:

- 9 1) the property was seized for the purposes of forfeiture . . . ;
- 10 2) the interest of the claimant was not forfeited;
- 11 3) the interest of the claimant was not remitted or mitigated (if
 12 the property was subject to forfeiture);
- 13 4) the claimant was not convicted of a crime for which the
 14 interest of the claimant in the property was subject to
 15 forfeiture

16 Id. (“Detention Exception Limitation”).⁴

17 **1. Sovereign Immunity for Money Damages.**

18 Plaintiff’s complaint does not set forth a waiver of sovereign immunity. In response to
 19 defendant’s Motion to Dismiss, plaintiff alleges that his suit is for the tort of conversion and
 20 should be allowed under the FTCA. Response at 7. Defendant alleges that the seizure of
 21 plaintiff’s van falls under the Detention Exception. See Motion to Dismiss at 6 (citing 28 U.S.C.
 22 § 2680(c)). Plaintiff counters that the detention falls within the Detention Exception Limitation.
 23 See Response at 7-8 (citing 28 U.S.C. § 2680(c)(1)-(4)).

24 Plaintiff’s claim falls within the Detention Exception. It is a claim arising out of the

25 ⁴ Congress amended § 2680(c) in 2000 to include the limitation. See Pub. L. 106-185.

1 detention of goods by a Customs official. See 28 U.S.C. § 2680(c). Plaintiff apparently
2 concedes this fact, instead arguing that the claim falls within the meaning of the Detention
3 Exception Limitation, which applies to “injury or loss of goods, merchandise, or other property.”
4 Plaintiff seeks damages for the lost use of his van while it was in the government’s custody.
5 Response at 8. Plaintiff must show a waiver of sovereign immunity that is “unequivocally
6 expressed.” Mitchell, 445 U.S. at 538. Injury based on lost use is not unequivocally expressed
7 in the language of the Detention Exception Limitation, which refers only to “injury or loss of
8 goods, merchandise, or other property.” Plaintiff’s property has not been injured or lost. It was
9 returned in the same condition as it was taken from plaintiff. See Response at 8. Therefore, the
10 plain language of the FTCA does not act as a waiver of the government’s sovereign immunity.
11

12 Moreover, the Congressional intent behind the amendment does not indicate the inclusion
13 of lost use damages. See 106 H.R. REP. No. 106-192 at *18 (1999). The limitation refers to
14 physical damage.

15 Seized property awaiting forfeiture can be quickly damaged: Seized
16 conveyances devalue from aging, lack of care, inadequate storage, and other
17 factors while waiting forfeiture. They often deteriorate—engines freeze,
18 batteries die, seals shrink and leak oil, boats sink, salt air and water corrode
19 metal surfaces . . . windows crack from heat. On occasion, vandals steal or
20 seriously damage conveyances The bill amends the Federal Tort
21 Claims Act to allow for tort claims against the United States government
22 based on the destruction, injury, or loss of goods, merchandise, or other
23 property while in the possession of any law enforcement officer

24 Id. Nothing in the legislative history suggests that claims for lost use are allowed under
25 the FTCA. While the language quoted above does reference “devalue from aging,” this is
26 not the claim plaintiff asserts. He has not claimed that his van was worth less after its

1 return, but instead he argues that he personally suffered injury for his lost ability to use the
2 van. Therefore, because plaintiff's claim for money damages does not fall within either
3 the plain language of the statute, nor within the Congressional intent behind the Detention
4 Exception Limitation, plaintiff's claim for money damages must be dismissed for lack of
5 subject matter jurisdiction.⁵

6 **2. Sovereign Immunity for Injunctive and Declaratory Relief.**

7
8 Plaintiff's remaining claims are for injunctive and declaratory relief. Plaintiff requests
9 orders requiring Customs to stop using "hold harmless" agreements and requiring Customs to
10 properly train its employees. Complaint at 3. These orders would "interfere with public
11 administration" or "restrain the government from acting or compel the government to act." See
12 Dugan, 372 U.S. at 620. Therefore the United States is the proper defendant and plaintiff must
13 show a waiver of sovereign immunity. The FTCA only applies to compensatory damages, not
14 injunctive relief. Moon v. Takisaki, 501 F.2d 389, 390 (9th Cir. 1974) ("[t]he Tort Claims Act
15 makes the United States liable in money damages for the torts of its agents under specified
16 conditions, but the Act does not submit the United States to injunctive relief."). Plaintiff has not
17 directed the Court to any other waiver of sovereign immunity other than the FTCA. See
18 Response at 7-9. Therefore, plaintiff's request for orders requiring Customs to stop using "hold
19 harmless" agreements and requiring Customs to properly train its employees is barred by
20 sovereign immunity.
21

22 Plaintiff also requests a declaratory judgment stating that Customs is not authorized to
23

24 ⁵ Additionally, plaintiff has not cited and the Court has not located any published authority
25 supporting plaintiff's claim that the United States has waived immunity for lost use damages claims.

1 seize vehicles strictly on the basis that the vehicle contains a hidden compartment. Complaint at
2 3. Some declaratory judgments against the United States are not barred by sovereign immunity.
3 See e.g., Panola Land Buyers Ass'n v. Shuman, 762 F.2d 1550, 1556 (11th Cir. 1985) (granting
4 declaratory action that would not interfere with public administration). In Shuman, the
5 declaration Panola sought stated that defendant had violated various obligations owed under
6 federal law. Id. The declaration did not require the government to act differently. Id. However,
7 when the declaratory judgment requires action on the part of the government, sovereign immunity
8 applies. See Maldonado v. Hodel, 683 F. Supp. 1322, 1326 (D. Utah 1988), affirmed by, 977
9 F.2d 596 (10th Cir. 1990) (declaratory decree in plaintiff's favor rejected because it could
10 "interfere with the public administration" and "restrain the government from acting"). Here, if
11 plaintiff's request is granted, Customs will be restrained in its search and seizure methods at the
12 border. Therefore, sovereign immunity bars this declaratory judgment because the relief would
13 "restrain the government from acting."
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15 For all of the foregoing reasons, defendant's Motion to Dismiss (Dkt. # 17) is GRANTED.
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17 DATED this 25th day of April, 2005.
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20 Robert S. Lasnik
21 United States District Judge
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26 ORDER DISMISSING ACTION FOR
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